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8
9 **NEW MOTOR VEHICLE BOARD**
10 **STATE OF CALIFORNIA**

11 LAIDLAW'S HARLEY-DAVIDSON SALES,
12 INC. dba LAIDLAW'S HARLEY-DAVIDSON

13 Protestant,

14 vs.

15 HARLEY-DAVIDSON MOTOR COMPANY,
a Corporation,

16 Respondent.

PROTEST NO. PR-2299-11

**PROTESTANT LAIDLAW'S HARLEY-
DAVIDSON SALES, INC. DBA
LAIDLAW'S HARLEY-DAVIDSON'S
POST-HEARING BRIEF**

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18
19 Protestant Laidlaw's Harley-Davidson Sales, Inc. dba Laidlaw's Harley-Davidson
20 ("Protestant") hereby submits its post-hearing brief in the above-entitled matter. References to the
21 administrative record are abbreviated.¹
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28 ¹ RT refers to Reporter's Transcript.

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1 **I. FACTUAL AND PROCEDURAL BACKGROUND**

2 Protestant has a long, well-established history as a Harley-Davidson dealership that reflects a
3 long-standing commitment to the Harley-Davidson brand. In 1958, Walter “Bob” Laidlaw began
4 operating “Laidlaw’s Harley-Davidson” motorcycle dealership in Rosemead, California. [RT Vol.
5 VII, 6:8-18 (W. Laidlaw).] Due to success of dealership and growth of business, in 1963, Walter
6 Laidlaw moved Laidlaw's eastward about a mile and a half and built a new state-of-the-art facility.
7 This new, two-story building measured approximately 60 feet by 100 feet.

8 In 1969 and 1970, Protestant was ranked the top volume dealer of Harley-Davidsons in
9 the world, selling approximately 575 units annually. [RT Vol. VII, 9:12-16 (W. Laidlaw).] In 1994,
10 Brent Laidlaw, Walter Laidlaw’s son, began working fulltime at the dealership with his father and
11 brother, Jarold Laidlaw, who is also a business owner and works closely with the service department
12 due to his technical and mechanical background. [RT Vol. VII, 12:22-24 (W. Laidlaw); RT Vol.
13 VII, 35:4-14 (B. Laidlaw); Exh.1.] That same year, Protestant expanded the building by doubling
14 its size and adding another 40 feet of frontage. [RT Vol. VII, 7:6-11; 8:4-9 (W. Laidlaw); RT Vol.
15 VII, 36:3-13 (B. Laidlaw).]

16 After almost two decades of successful sales, in 1999, the Laidlaw family sold their
17 Rosemead dealership and used the proceeds, with Respondent’s encouragement, to purchase a 2.1
18 acre property in Baldwin Park, California as the location of their new, 46,000 square-foot
19 dealership. Construction began in 2000 and the dealership officially relocated in June 2002.
20 Laidlaw’s growth has been steady over the years, becoming one of the highest volume dealers in
21 Southern California and the nation. Following the relocation, Brent Laidlaw, Walter Laidlaw’s son,
22 became the dealer operator. [RT Vol. VII, 42:12-15 (B. Laidlaw); Exh. 1, pg. 2; Exh. 502.]

23 In 2002, Protestant began its motorcycle rental operations through Respondent’s in-
24 house rental program for dealers called the “authorized” rental program. In 2006, this arrangement
25 was switched to an Eagle Rider franchise (a non-Harley-Davidson entity that franchises large
26 motorcycle rental operations, specializing in Harley-Davidsons). As a result of its continued growth
27 in operations, in 2006, the dealership hired Richard Litchfield as a full time General Manager,
28 though only the Laidlaw family members own any interest in the dealership, which has been the

1 case since its inception. [RT Vol. IX, 5:14-18 (Litchfield).] In 2007, Protestant added an insurance
2 agency business at the dealership to offer convenient insurance sales to Laidlaw's customers. [RT
3 Vol. VII, 53:9-54:25 (B. Laidlaw).]

4 As a condition of sales and service, Protestant and Respondent entered into a
5 "General Conditions of Sales and Service" contract ("Dealer Agreement"). The Dealer Agreement
6 includes a "Non-Retail Sales" provision which states that "Dealer shall not sell Harley-Davidson
7 Products for resale to non-retail customers, except to other United States authorized dealers in
8 accordance with Seller's written policies." [Exh. 2, pg. 2.]

9 To Protestant's surprise, on February 4, 2011, Protestant received a letter from Steve
10 Verduyn, Manager of Dealer Credit and Compliance for Harley-Davidson, which identified
11 approximately 18 potential violations of Respondent's Non-Retail Sales Policy. The letter requested
12 documentation to substantiate that the identified sales were in compliance with Respondent's Non-
13 Retail Sales Policy. Mr. Verduyn had obtained this list of vehicles shipped overseas using database
14 information from the National Insurance Crime Bureau. [RT Vol. III, 10:7-19; 13:20-21 (Verduyn);
15 Exh. 16.] In contrast to the "Non-Retail Sales" provision found within the Dealer Agreement, the
16 Non-Retail Sales Policy is a separate, very detailed set of rules issued by Respondent prohibiting the
17 sale of new or previously unregistered motorcycles to a customer who intends to resell the vehicle
18 or who intends to ship the motorcycle outside the United States. The Non-Retail Sales Policy does
19 not prohibit the export of, or otherwise apply to, used motorcycles. [Exhs. 6, 16.] Vehicle Code
20 Section 655 defines a used motorcycle as a vehicle that has been: (1) sold or registered with the
21 DMV; (2) sold and operated on the highways of any other state or country; (3) registered with the
22 DMV of any other state or country; or (4) has been operated as an unregistered demonstrator vehicle
23 in the sales work of a dealer or used by a manufacturer in his or her sales or distribution work.

24 As a follow up to the February 4 letter, on March 23, 2011, Mr. Verduyn visited Protestant's
25 dealership and conducted an audit of the sales documents with respect to the Non-Retail Sales
26 Policy. [RT Vol. II, 84:13-16 (Kennedy).] Protestant fully cooperated with Mr. Verduyn during the
27 course of the on-site audit. [RT Vol. IV, 32: 11-14 (Verduyn).] On April 14, 2011, based on the
28 results of the audit, Protestant received the notice of termination of its franchise agreement with

1 Respondent. The notice identifies 42 violations of the Non-Retail Sales Policy since December 27,
2 2008 for a period of approximately two years. The notice also identifies 17 potential violations of
3 Respondent's Fleet Sales Policy, which prohibits the sales to rental operations unless they are
4 specifically authorized or specially approved by Respondent and if the motorcycle is supplied to the
5 dealer through the Rental Fleet Pool. [RT Vol. II, 89:13-15 (Kennedy); Exh. 237.]

6 In the notice of termination, Respondent charged back \$16,007.07 of VIP money from
7 Protestant. [RT Vol. II, 29:5-11; 184:25-185:5; 187:12-20 (Kennedy); Exh. 237.] Respondent
8 maintains a so-called incentive program called VIP. This program was formerly known as a
9 holdback, but the terminology changed years ago to VIP. Like a holdback, VIP is earned at the time
10 a dealer purchases a motorcycle. The dealer gets paid whether or not the motorcycle is sold. The
11 VIP program terms do, however, say that "non-retail sales" (with the only defining document for
12 that term being other Harley-Davidson policies) are not eligible for the incentive. [Exh. 237.]

13 On May 12, 2011, in response to the notice of termination, Protestant timely filed the
14 within protest with the New Motor Vehicle Board challenging Respondent's termination notice and
15 threat to terminate Protestant's franchise agreement until such time that the Board held a hearing
16 and made a determination as to whether good cause existed for termination.

17 A hearing was held from November 30 to December 14, 2011 before J. Marilyn Wong,
18 Administrative Law Judge for the Board, in Sacramento, California. Respondent was represented
19 by Robert Ebe and Brett Waxdeck of Cooper White & Cooper, 201 California Street, 17th Floor,
20 San Francisco, California. Protestant was represented by Halbert Rasmussen and Franjo Dolenac of
21 Manning, Leaver, Bruder & Berich, 5750 Wilshire Blvd., Suite 655, Los Angeles, California. [RT
22 Vols. I-XI.] The evidence at the hearing showed that Respondent failed to show sufficient evidence
23 that good cause in fact exists to terminate Protestant's franchise.

24 **II. STATUTORY STANDARD**

25 1. In accordance with Vehicle Code Section 3060, when a seasonable protest has been filed
26 in response to a notice of intent to terminate a franchise, as is present in the within Protest, the
27 Board must hold a hearing to determine if "good cause" exists for termination. [section 3060.]
28

1 2. Vehicle Code Section 3066 places the burden of proof on the Respondent-franchisor to
2 establish that there is good cause to terminate the franchise. [section 3066.]

3 3. Pursuant to Vehicle Code Section 3061, Protestant contends that good cause does not
4 exist to terminate Protestant's franchise for the following reasons, among others:

- 5 (a) The amount of business transacted by the Protestant is substantial, as compared to the
6 business available to it [section 3061(a)];
- 7 (b) The investments necessarily made and obligations incurred by the Protestant to perform
8 its part of the franchise have been substantial and termination will result in a significant
9 loss to Protestant as to these investments [section 3061(b)];
- 10 (c) The investment in Protestant's Harley-Davidson business is substantial, has significant
11 permanency and will be significantly adversely affected by termination [section
12 3061(c)];
- 13 (d) Protestant's permanent investment will be significantly adversely affected by the
14 termination of its franchise [section 3061(c)];
- 15 (e) Termination of Protestant's franchise will be injurious to the public welfare [section
16 3061(d)];
- 17 (f) The current franchisees are providing more than adequate motor vehicle sales and service
18 facilities, equipment, vehicle parts and qualified service personnel to reasonably provide
19 for the needs of the consumers for the motor vehicles handled by the Protestant and has
20 been and is rendering adequate services to the public [section 3061(e)];
- 21 (g) The Protestant has fulfilled the warranty obligations of the Respondent [section 3061(f)];
- 22 (h) The extent of Protestant's failure to comply with the terms of the franchise agreement is
23 insufficiently material to warrant termination [section 3061(g).]

24
25 **III. PROTESTANT HAS TRANSACTED AN ADEQUATE AMOUNT OF BUSINESS
26 COMPARED TO THE BUSINESS AVAILABLE TO IT.**

27 Respondent has failed to meet its burden to show that Protestant has failed to transact an
28 adequate amount of business compared to the business available to it. As an initial matter,
Respondent does not dispute that Protestant is properly performing as to motorcycle

1 sales in its designated territory or that there are any concerns with Protestant's general sales
2 performance. [RT Vol. II, 133:10-134:17 (Kennedy).]

3
4 Based on Protestant's November 2011 year-to-date sales ranking report, Protestant ranks
5 101 out of the entire Harley-Davidson national dealer network in terms of sales volume. [RT Vol.
6 II, 134:9-14 (Kennedy).] Protestant is ranked number one in its district and second in Southern
7 California in terms of sales volume. [RT Vol. II, 135:15-20 (Kennedy).]

8 Protestant has received numerous recognitions from Respondent for meeting and exceeding
9 performance expectations. In calendar years 2005, 2006 and 2007, Protestant achieved Gold Bar &
10 Shield Awards. Respondent's Bar and Shield Award Program is an awards program for dealers
11 based on excellence in retail sales performance, operations management and marketing performance
12 in the current year in a given region. A dealer that falls into the top four in the region receives a
13 Gold award; a dealer that falls in the next eight rankings receives a Silver award; and a dealer that
14 falls in the next twelve rankings receives a bronze award. Only 25 stores across the country receive
15 a Gold Bar and Shield Award. [RT Vol. IV, 70:9-72:18 (Hawken); Vol. VII, 137:16-138:17 (B.
16 Laidlaw); Exh. 124.] In both calendar years 2008 and 2009, Protestant achieved Bronze Bar &
17 Shield Awards. [RT Vol. IV, 70:9-72:18 (Hawken); Exhs. 158 and 159.]

18 Respondent has also recognized Protestant's long-term loyalty to the Harley-Davidson
19 brand. In 2008, Walter Laidlaw, the dealership's founder, was recognized by Harley-
20 Davidson Motor Company for 50-years of service as an authorized Harley-Davidson dealer and
21 received a 50-Year Achievement Award, which recognizes achievement in service performances,
22 marketing, parts and accessories performance, gross sales, retail sales, sales improvement over the
23 previous year and service loyalty. [RT Vol. VII, 136:6-16 (B. Laidlaw).] With regard to service
24 loyalty, Protestant's June 2011 year-to-date service retention of sales customers was 75.2%. This
25 figure demonstrates the high level of loyalty of the buying customer to the dealership. [RT Vol. IV,
26 139:16-140:14 (Stewart); Exh. 155.]

27 The amount of business transacted by the Protestant relative to the business available to
28 the dealership is comparatively high. Protestant's number of registrations and sales as compared to
the national average in its dealer-assigned territory of Baldwin Park was 158% in 2010. In 2011,

1 that figure was 164.4%. These figures show that Protestant's sales relative to other dealerships in
2 the district is substantially higher. [RT Vol. XI, 28:5-30:22 (Stockton); Exh. 634, Tab 7]

3 As of December 2010, Protestant ranked 62 of 702 dealerships nationwide based on net
4 sales. [RT Vol. VII, 150: 6-22 (B. Laidlaw); Exh. 120.] In October 2011, the year-to-date
5 aggregate data reflects a 3.6% increase in net sales compared to the previous year. The same data
6 shows a 3.1% increase in net profits before taxes compared to the previous year. The number of
7 new vehicle net sales increased by 2.8% compared to the previous year for the same period. [RT
8 Vol. VII, 150:23-153:9 (B. Laidlaw); Exh. 540.]

9 In addition to profitability, a key metric that Harley-Davidson uses is customer
10 satisfaction. The customer satisfaction index is measured at two critical points in the ownership of a
11 vehicle: (1) 30 days after purchasing a vehicle and (2) 18 months after purchasing a vehicle. The 18
12 month survey results indicate how well the dealership is serving customers through the service
13 department, parts and accessories department, Motorclothes (Harley-Davidson merchandise)
14 department and all other departments not associated with vehicle sales. In October 2011, the year-
15 to-date aggregate data from the 30-day customer surveys shows that that overall customer
16 satisfaction was up by 1.5% from 9.45 to 9.59 over the same period in 2010. The same year-to-date
17 data at the 18-month mark shows that customer satisfaction was up 4.4% from 8.68 to 9.06 over the
18 same period in 2010. [RT Vol. VII, 153:10-154:20 (B. Laidlaw); Exh. 540.]

19 October 2011 year-to-date aggregate data shows that Protestant's total number of new
20 unit retail sales of Harley-Davidson motorcycles increased from 311 vehicles to 383 vehicles over
21 the same period in 2010 an increase of over 23%. [RT Vol. VII, 156:1-6 (B. Laidlaw); Exh. 540.]
22 Protestant was ranked 55 out of 703 dealerships nationwide in total retail units sold
23 during the 2011 calendar year through November 2011. [RT Vol. VII, 156:10-14 (B. Laidlaw);
24 Exh. 540.]

25 Based on the evidence adduced at trial, Respondent does not, and indeed cannot, dispute that
26 the amount of business transacted by Protestant relative to the business available to it is
27 comparatively high and satisfactory.
28

1 **IV. PROTESTANT'S INVESTMENTS NECESSARILY MADE AND OBLIGATIONS**
2 **INCURRED ARE SUBSTANTIAL**

3 Protestant's dealership is family owned and operated; the same investors of the
4 dealership are those of the real property. For many years, the franchisee or dealer-licensee,
5 Laidlaw's Harley-Davidson Sales, Inc., conducted its motorcycle business out of the location in the
6 city of Rosemead in a building that had been acquired in 1963. In 1998, Laidlaw Family Realty
7 Associates, LLC was formed to hold that commercial building and all the real property. When the
8 Laidlaws moved out of the Rosemead building because the City of Rosemead "condemned" the
9 building, the proceeds from that sale were used towards the construction and purchase of the new,
10 current facility located at 1919 Puente Avenue in Baldwin Park. In 2000, Laidlaw BP Realty, LLC
11 was formed to hold the Baldwin Park building that was improved and expanded to its present state.
12 Because the City of Rosemead "condemned" the Rosemead building, Laidlaw Realty Associates,
13 LLC completed an Internal Revenue Code Section 1033 exchange of that building for a 40%
14 undivided interest in the Baldwin Park building. This accounts for the present ownership of the
15 Baldwin Park building and real estate at 40% by Laidlaw Family Realty Associates, LLC and 60%
16 by Laidlaw BP Realty, LLC. Laidlaw BP Realty, LLC is jointly owned by Brent Laidlaw and his
17 three siblings. Laidlaw Family Realty Associates, LLC is owned by Brent Laidlaw's father, Walter
18 Laidlaw. [RT Vol. VII, 20:16-21:6 (W. Laidlaw); Vol. VIII, 15:15-16:16 (B. Laidlaw); Exh. 146A;
19 Exh. 146B; Exh. 146C; Exh. 147; Exh. 148.]

20 Protestant has incurred substantial costs to establish its modern, state-of-the-art facility. The
21 total construction costs for the expansion of the dealership to its current 46,000 square-foot,
22 Baldwin Park facility was approximately \$4.8 million. Protestant purchased the land where the
23 current dealership is located for \$2.1 million. When the land was purchased, there was a 1962
24 building located on the property, measuring 200 feet long and 60 feet wide. Extensive construction
25 was conducted to bring the building up to earthquake code and to expand the building to its current
26 state, which is currently 46,000 square-feet. [RT VIII, 24:1-25:19 (B. Laidlaw).] Additionally, in
27 2004 and 2005, Protestant installed 534 solar panels on the roof of its Baldwin Park dealership, and
28 while it was a significant investment, this installation has substantially reduced the dealership's

1 electrical costs. [RT Vol. VII, 44:15-24 (B. Laidlaw).]

2 Investments made are assets funded by the Protestant and its related entities, including
3 Laidlaw BP Realty, LLC and Laidlaw Family Realty Associates, LLC. Assets are created from
4 funds contributed as capital from owners, loans from non-third parties (obligations), funds
5 contributed by loans from related entities (obligations), and retained earnings (cumulative profits
6 less distributions) of the entities. Investments made are from capital infused into the dealership,
7 retained earnings and obligations of the Protestant and related entities. [Exh. 135, p.4.]

8 The following chart shows Protestant's substantial capital investments in Laidlaw's
9 Harley-Davidson Sales, Inc. and its related entities, Laidlaw Family Realty Associates, LLC and
10 Laidlaw BP Realty, LLC:

11	Entity	Capital Investments
12	Laidlaw's Harley-Davidson Sales, Inc.	Exceeds \$2,300,000 [Exh. 135, p. 4.]
13	Laidlaw Family Realty Associates, LLC	Exceeds \$1,800,000 [Exh. 135, p. 4.]
14	Laidlaw BP Realty, LLC	Exceeds \$740,000 [Exh. 135, p. 4.]
	Total Capital Investments:	\$4,840,000 [Exh. 135, p. 4.]

15 The chart below shows Protestant and its related entities' total investments in assets at
16 original cost:

17	Entity	Total Investments
18	Laidlaw's Harley-Davidson Sales, Inc.'s investments in facilities and other depreciable assets	\$2,637,000 [Ex. 135, p.4.; Exh. 138]
19	Laidlaw's Harley-Davidson Sales, Inc.'s cash, receivables and inventory	\$3,531,000 [Exh. 135, p. 4.]
20	Laidlaw's Family Realty Associates, LLC's investments in facilities and other depreciable assets	\$1,374,000 [Exh. 135, p. 4.]
21	Laidlaw's Family Realty Associates, LLC's cash, receivables and inventory	\$8,000 [Exh. 135, p.4.]
22	Laidlaw BP Realty, LLC's investments in facilities and other depreciable assets	\$2,011,000 [Exh. 135, p.4.]
23	Laidlaw BP Realty, LLC's cash, receivables and inventory	\$59,000 [Exh. 135, p. 4.]
24	Total Investments:	\$10,620, 000 [Exh. 135, p. 4.]

26 The chart below shows Protestant and its related entities' total investment in assets at
27 estimated current value or current basis:
28

Entity	Total Investments
Laidlaw's Harley-Davidson Sales, Inc.'s investments in furniture and equipment	\$6,370,000 [Exh. 135, p. 4.]
Laidlaw's Harley-Davidson Sales, Inc.'s cash, receivables and inventory	\$3,534,000 [Exh. 135, p.4.]
Facilities	\$6,640,000 [Exh. 135, p. 4.]
Laidlaw's Family Realty Associates, LLC's cash and other assets	\$8,000 [Exh. 135, p. 4.]
Laidlaw BP Realty, LLC's cash and other assets	\$59,000 [Exh. 135, p. 4.]
Total Investments	\$16,611,000 [Exh. 135, p. 4.]

Overall, Protestant has made substantial investments in the facility and the business. Brent Laidlaw estimates that the total of investments made is approximately \$6.5 to \$7 million. [RT Vol. VIII, 10:17-24 (B. Laidlaw).] Moreover, significant investments have been made in the dealership's fixtures and modern equipment, including over 50 computer work stations, over 30 printers, two servers, 35 surveillance cameras, numerous merchandising fixtures, boutique lighting, signage, work stations, desks, service department lifts and work benches. [RT Vol. VIII, 10:25-11:11 (B. Laidlaw).] Based on the foregoing review of Protestant's asset classes, it is indisputable that Protestant has incurred substantial obligations and has made significant investments in the dealership to preserve its longevity.

V. PROTESTANT'S PERMANENCY OF INVESTMENT IN THE DEALERSHIP IS SUBSTANTIAL

As Protestant's expert, Carl Woodward, stated in his expert report, Permanency of investment is not a term of art used in or otherwise defined by the accounting profession or automobile dealer industry. Analysis therefore requires an exploration of all investments made in the business, which in turn requires a review of all aspects of permanency, not merely the degree of liquidity. While nothing is permanent from a business perspective, permanency would be considered a relative term with certain assets being less permanent while other assets would be comparatively more permanent. The long term assets which are more permanent in nature include furniture, fixtures, equipment, land, buildings and facilities, goodwill-blue sky, and customer lists and other assets necessary to honor contingent future liabilities. [RT Vol. X, 81:17-83:2 (Woodward); Exh. 135, p. 3, 5.]

The total construction costs for the expansion of the dealership to its current 46,000

1 square-foot, Baldwin Park facility was approximately \$4.8 million. Protestant purchased the land
2 where the current dealership is located for \$2.1 million. When the land was purchased, there was a
3 1962 building located on the property, measuring 200 feet long and 60 feet wide. Extensive
4 construction was conducted to bring the building up to earthquake code and to expand the building
5 to its current state, which is currently 46,000 square-feet. [RT VIII, 24:1-25:19 (B. Laidlaw).]

6 The guarantees (obligations of loans to the dealer-licensee, Laidlaw's Harley-Davidson
7 Sales, Inc., which include the debt of the dealer-licensee and real estate mortgages exceeds \$6
8 million and varies monthly. [Exh. 135, p. 5.] In early 2011, Respondent's dealership facility was
9 appraised at \$6.64 million. With respect to the real property and buildings owned by the two LLCs,
10 Brent Laidlaw estimates that the value of the Baldwin Park dealership is approximately \$6,500,000
11 to \$7,000,000. [RT VIII, 20:22-21:9 (B. Laidlaw); RT Vol. X, 23:23-24; 29:7-30:18 (Woodward);
12 Exh. 135, p. 5.]

13 To date, the Laidlaw family has invested \$2,300,000 in capital in the dealership,
14 \$1,800,000 in capital in Laidlaw Realty Associates, LLC and \$740,000 in capital in Laidlaw BP
15 Realty, LLC for a total of \$4,840,000. The property is a single purpose facility which makes the
16 investment therein more permanent. There are also long term (non-current and more permanent)
17 assets invested in the dealership consisting of leasehold improvements, furniture, signs and
18 equipment, company vehicles, parts and accessories equipment, and service equipment. The current
19 combined value of these assets for the three entities (dealer-licensee, Laidlaw Realty Associates,
20 LLC and Laidlaw BP Realty, LLC) is approximately \$13,010,000. This figure is the combined sum
21 of \$6,370,000, the current value of the facilities, equipment and intangible for the dealer-licensee,
22 Laidlaw's Harley-Davidson Sales, Inc., and the appraised value of the facility at \$6,640,000. The
23 total costs incurred for these assets for the three entities is \$7,021,000. This figure is the combined
24 sum of \$2,636,000 for costs incurred by Laidlaw's Harley-Davidson Sales, Inc. and \$4,385,000 for
25 the costs incurred by the related entities, Laidlaw Realty Associates, LLC and Laidlaw BP Realty,
26 LLC. [RT VIII, 20:22-21:9 (B. Laidlaw); RT Vol. X, 22:21-23: 24; 29:7-30:18; 34:6-35:16
27 (Woodward); Exh. 135, p. 5; Exh. 138].

28 The current range of goodwill or franchise value of Laidlaw's Harley-Davidson is \$4

1 million to \$8 million, with a midpoint of \$6 million. [RT Vol. X, 6:25-9:8; 13:6-12 (Woodward);
2 Exh. 135, p. 6.] Termination of Respondent’s dealership will result in a loss of \$2 million to the
3 value of the facility and a complete loss of the goodwill or franchise value of \$6 million. [RT Vol.
4 X, 23:9-16; 33:3-34:5 (Woodward); Exh. 135, p. 6.]

5 **VI. TERMINATION WOULD BE INJURIOUS TO THE PUBLIC WELFARE**

6 If Protestant was terminated as a Harley-Davidson dealership, its business would be forced
7 to close down which would negatively impact its clientele and Protestant’s community. For
8 example, Protestant is exclusively involved with multiple contract negotiations with police
9 departments in neighboring communities, including the Los Angeles Police Department and Los
10 Angeles World Airport to sell them Harley-Davidson parts, as well as leasing vehicles to other
11 municipalities including West Covina and City of El Monte. [RT Vol. IX, 85:10-86:1 (Litchfield).]
12 The initial contracts with LAX police department and the LAPD were for a period of 5
13 years with a \$5 million cap. [RT Vol. IX, 86:1-19 (Litchfield).]

14 For many years, Protestant has supported its community through local, sponsored charity
15 activities. For example, Protestant organizes, sponsors and supports “fallen officer” community
16 events and benefit rides on behalf of the local police departments, as well as numerous other
17 charities and rallies, including the Ride for Autism Organization, Operate Gratitude, and events for
18 the Pasadena Humane Society. Many local charities start their fundraisers and rides at Protestant’s
19 dealership because of its convenient location, unique capacity by virtue of its large facility and
20 strong cooperation with the city of Baldwin Park. Protestant has hosted numerous charities and
21 fundraisers with up to 600 participants, including members of the California Highway Patrol. These
22 events often begin at the dealership and organized rallies continue down the local freeways for
23 miles. Protestant has been actively serving the community and local charities by hosting and
24 sponsoring these events. [RT Vol. VII, 11:15-12:7; 20:4-15; 68:20-69:21; 139:1-15 (B. Laidlaw);
25 Exh. 124.]²

26
27 _____
28 ² Indeed, a more visible, but no less significant, loss to the community if Protestant was terminated would be the large, prominent “Laidlaw’s Harley-Davidson” signage by the 10-freeway which has become an iconic fixture. The city of Baldwin Park was instrumental in assisting the dealership in attaining a permit for the signage. An average of 55 million cars drive by the building on the freeway each year. [RT Vol. VII, 47:9-48:13; 58:18-25; 60:8-10; 61:14-21 (B.

1 As to the business aspect, Protestant maintains an insurance center located inside its
2 dealership, providing optional insurance policies to its customers to ensure that every customer has
3 adequate insurance coverage. Many customers frequently renew their insurance policy with
4 Protestant. Protestant sells over 600 policies a year and over a thousand renewals to its existing
5 customer base [RT Vol. VII, 53:9-54:3; 55:1-4 (B. Laidlaw).] Since the dealership sells insurance
6 as a service to its customers, Protestant also works with many insurance companies and repairs
7 customers' motorcycles in a timely fashion with its well-staffed authorized collision repair center.
8 [RT Vol. VII, 64:4-65:7; 55:9-20 (B. Laidlaw).]

9 Protestant also maintains and operates an Eagle Rider rental facility that includes a large
10 fleet of rental bikes for customers who are considering purchasing a motorcycle or for customers
11 whose motorcycle is in repair or there is an emergency breakdown and the customer needs a loaned
12 vehicle while it is serviced. The culmination of the rental experience is to ultimately sell a vehicle
13 to the customer. [RT Vol. VII, 56:14-57:4 (B. Laidlaw).]

14 Respondent's customer database indicates that the number of customers that Protestant has
15 reached out to over its many years of business is 90,422 and there are 12,151 customers that are
16 active with the dealership within the last 24 months. [RT Vol. VII, 129:20-130:5 (B. Laidlaw); Exh.
17 124.] Protestant maintains a large service department with a high customer loyalty rating of 70 to
18 80 percent, which is the highest in the district, evidencing that customers often return to Protestant
19 for their warranty services and needs. [RT Vol. VII, 63:17-64:3 (B. Laidlaw).]

20 Protestant has a very active Harley Owners Group ("HOG") chapter which it has operated
21 for over 20 years and includes over 177 members. Membership in Protestant's HOG chapter brings
22 Harley enthusiasts together on group rides, which the dealership supports by riding with the group.
23 The dealership charts the HOG chapter and provides them with raffle prizes and holds HOG
24 events each year at the dealership. Once a month, HOG members hold meetings and dealership
25 employees show their support by attending. The dealership also extends special services and
26 discounts on parts for customers who join Protestant's HOG chapter. [RT Vol. VII, 130:15-131:25

27
28 Laidlaw.)]

1 (B. Laidlaw); Exh. 124.]

2 Additionally, Protestant operates the Motorcycle Value Program (“MVP”) which offers
3 unique privileges exclusively to Laidlaw's customers. There are currently 6000 customers in the
4 program and no other dealership in the western United States offers the program. MVP is exclusive
5 to only 24 dealers in the United States. By paying for membership, the MVP customer receives
6 discounts on parts and services, special rides, dinners, special openings and extended shopping
7 hours. MVP membership increases customary loyalty to the dealership. Approximately 50% of
8 Protestant’s sales are from MVP members. [RT Vol. VII, 132:10-135:8 (B. Laidlaw); Exh. 124.]

9 Losses to the customer base would be significant if Protestant was terminated. Customers
10 would no longer have the facility and the comforts and the amenities that come with use of the
11 facility, such as the Motor Value Program, the rental opportunities, the collision repair center, the
12 HOG chapter operated by the dealership, and the loss of use of the facility for the charitable events.
13 Additionally, two local police departments would no longer have a number of their police vehicles
14 because Protestant leases units to them. [RT Vol. VII, 54:19-56:5; Exh. 124.]

15 Another unique benefit offered by Protestant is the Priority Maintenance Service Plan which
16 is a pre-paid, three year maintenance contract that is optional to customers. Over 600 maintenance
17 plans are in effect. If Protestant was terminated, these plans would have to be refunded to customers
18 since Protestant is the only dealer that provides these services and the benefit of the maintenance
19 program to its customers. [RT Vol. VII, 56:11-18; Exh. 134.]

20 Possibly the most immediate injurious impact of termination would be to Protestant’s staff.
21 There are approximately 50 employees who would lose their jobs if Protestant was terminated.
22 Most of these employees are specifically trained to work with Harley-Davidsons, particularly the
23 eight, specially-trained technicians. The employees would also lose their health benefits offered
24 through the COBRA plan, as well as their 401k and other exclusive employee benefits. [RT Vol.
25 VII, 57:3-21 (B. Laidlaw).]

26 In essence, the termination of Protestant would leave a void for Protestant’s staff,
27 community and clientele.
28

1 **VII. PROTESTANT HAS ADEQUATE MOTOR VEHICLE SALES AND SERVICES**
2 **FACILITIES, EQUIPMENT, VEHICLE PARTS AND QUALIFIED SERVICE**
3 **PERSONNEL TO REASONABLY PROVIDE FOR THE NEEDS OF CUSTOMERS**
4 **AND IT HAS BEEN RENDERING ADEQUATE SERVICES TO THE PUBLIC**

5 For the reasons set forth below, Protestant asserts that it has adequate motor vehicle sales
6 and service facilities, equipment, vehicle parts and qualified service personnel to reasonable provide
7 for the needs of the public. Respondent has failed to provide any evidence supporting the
8 proposition that Protestant's sales and service facilities, do not reasonably meet the needs of its
9 consumers.

10 As an initial matter, Respondent does not dispute that Protestant maintains an adequate
11 facility. [RT Vol. II, 133:10-134:17 (Kennedy).] In fact, Respondent is not aware of any
12 inadequacies in Protestant's staff as to their size, training or capacity to handle customer service.
13 [RT Vol. II, 135:2-7 (Kennedy).] Furthermore, Respondent is not aware of any complaints that
14 Protestant has received in terms of serving customers coming in for warranty work and having their
15 vehicle repaired. [RT Vol. II, 134: 22-135:1 (Kennedy).] Respondent acknowledges that
16 Protestant's facilities are maintained up to Harley-Davidson's standards. [RT Vol. IV, 75:5-12
17 (Hawken).]

18 Protestant's store includes a design center where customers can customize their
19 motorcycle with features and accessories to obtain a more personalized look and fit for their vehicle.
20 [RT Vol. VII, 50:21-51:6 (B. Laidlaw); Exh. 502.] Protestant's store includes an Eagle Rider rental
21 center and an insurance center. The rental facility includes a large fleet of rental bikes for customers
22 who are considering purchasing a motorcycle or for customers whose motorcycle is in repair or
23 there is an emergency breakdown and the customer needs a loaner vehicle while it is serviced. The
24 culmination of the rental experience is to ultimately sell a vehicle to the customer. In 2010, the
25 rental center provided services to approximately 566 customers. [RT Vol. VII, 53:3-8; 56:14-57:4
26 (B. Laidlaw); Exh. 124.]

27 As discussed above, Protestant's maintains an insurance center located inside its dealership,
28 providing optional insurance policies to its customers to make sure that every customer has adequate
insurance coverage. Many customers frequently renew their insurance policy with Protestant.

1 Protestant sells over 600 policies a year and over a thousand renewals to existing customer base. In
2 2010, Protestant issued 506 new insurance policies and 1020 policy renewals. In 2009, Protestant
3 issued 451 new policies and 1055 renewals. In 2008, Protestant issued 609 new policies and 803
4 renewals. [RT Vol. VII, 53:9-54:3; 55:1-4 (B. Laidlaw); Exh. 124] Since the dealership sells
5 insurance as a service to its customers, Protestant also works with many insurance companies and
6 repairs customers' motorcycles in a timely fashion with its well-staffed authorized collision repair
7 center. [RT Vol. VII, 64:4-65:7; 55:9-20 (B. Laidlaw); Exh. 502.]

8 The dealership is also well-equipped to handle heavy consumer service demands, if
9 necessary. Protestant's service department includes 24 repair lifts, 18 of which are in-ground floor
10 lifts. The dealership employs eight specially-skilled service technicians. Seventy to eighty percent
11 of Protestant's customers return to the dealership to have warranty work completed, which is the
12 highest ranking in the district. Protestant has never been constrained to take on more service work.
13 [RT Vol. VII, 63:10-64:3 (B. Laidlaw); Vol. VIII, 6:5-24 (B. Laidlaw); Exh. 502.] Currently, the
14 dealership employs approximately 50 employees and the dealership itself
15 measures 46,000 square feet, including the showroom and service department. [RT Vol. VII, 57:3-
16 21 (B. Laidlaw); RT Vol. VIII, 24:6-13 (B. Laidlaw); Exh. 502.]

17 In 2010, Protestant's service department completed 4,745 work orders totaling
18 \$1,364,288 in labor sold, which is above district, region and national averages. This figure reflects a
19 proficiency level of 87%. Proficiency is a key metric of service department excellence, productivity
20 and efficiency. Proficiency measures a technician's ability to complete work, complete work
21 accurately and complete work within the designated time frame. In 2009, the service department
22 completed 5,495 work orders, totaling \$1,626,240 in labor sold, with an 80% proficiency level. In
23 2008, the service department completed 6,497 work orders, totaling \$1,514,908 in labor sold, at a
24 71% proficiency level. [RT Vol. VII, 135:9-136:4; Exh. 124.]

25 Protestant also operates a certified collision repair center. In 2010, the collision center
26 completed 160 work orders totaling \$467,242 in parts and labor sold. In 2009, the collision center
27 completed 186 work orders totaling \$734,062 in parts and labor sold. In 2008, the collision center
28 completed 311 work orders totaling \$1,119,964 in parts and labor sold. [Exh. 124.]

1 Protestant offers a Priority Maintenance Service Plan which is a pre-paid, three year
2 maintenance contract offered to customers. Over 600 maintenance plans are in effect which would
3 have to be refunded to Protestant's customers since Protestant is the sole dealer that provides these
4 services and the benefit of the maintenance program to its customers. [RT Vol. VII, 56:11-18; Exh.
5 134.]

6 In terms of service metrics, Protestant's September 2011 year-to-date aggregate sales
7 data shows that that the dealership was ranked 10 out of 693 Harley dealerships nationwide in
8 overall net service sales and 110 out of 697 dealerships nationwide in service proficiency. Out of
9 697 nationwide Harley dealerships, Protestant was ranked 47 in new vehicle unit sales and 31 in
10 parts and accessories sale. [RT Vol. VIII, 5:15-25 (B. Laidlaw); Exh. 539.] As of September 2011,
11 the year-to-date aggregate data of customers retained for service is 75.6%, an increase of 2% over
12 the same period last year. As of October 2011, that figured increased to 80.2%, an increase of 7.2%
13 over the last year. [RT Vol. VIII, 9:10-10:5 (B. Laidlaw); Exh. 539; Exh. 540.]

14 **VIII. PROTESTANT HAS FULFILLED RESPONDENT'S WARRANTY OBLIGATIONS**

15 1. Respondent is not aware of any complaints as to Protestant's ability to provide proper
16 warranty services and vehicle repairs. [RT Vol. II, 134:18-135:1 (Kennedy).]

17 2. Respondent is not aware of any warranty claim or reimbursement that Respondent has
18 had to make as a result of Protestant's sale of violation units. [RT Vol. I, 148:13-149:25
19 (Kennedy).]

20 **IX. PROTESTANT HAS SUBSTANTIALLY COMPLIED WITH THE TERMS OF THE FRANCHISE**

21 Respondent's only basis for termination is non-compliance with Respondent's Non-
22 Retail Sales Policy and Fleet Sales Policy, as set forth in the termination notice. The Non-Retail
23 Sales Policy does not amend or modify the Dealer Agreement nor are its specific terms incorporated
24 into the Dealer Agreement. However, the Dealer Agreement does provide that dealers shall comply
25 with the policies and position statements issued by Respondent regarding the requirement that sales
26 not be "for resale." [Exh. 2, pg. 2; Exh. 237.] Respondent's Fleet Sales Policy is also not
27 incorporated into the Dealer Agreement. In fact, the control of sales to business (fleets) in a retail
28

1 (that is, not for resale) context is not even addressed in the Dealer Agreement. [Exh. 2.]

2 Respondent unilaterally revises and issues the Non-Retail Sales Policy periodically (generally every
3 year), but dealers are not asked to approve or sign off on the policy. Respondent does not allege that
4 Protestant violated any of Respondent's other corporate policies.

5 Additionally, Respondent's Non-Retail Sales Policy identifies the following consequences
6 for violation therein: (1) placing limitations on future product allocations or shipments; (2) charging
7 back to the dealer any incentives or allowances credited or paid with respect to the violating sale; (3)
8 placing the dealer in Not in Good standing status; (4) charging back any internal and external audit
9 and legal expenses to the dealer; or (5) terminating the dealer's contract. [RT Vol. II, 156:4-157:1
10 (Kennedy); Exhs. 6, 208, 209.]

11 Respondent's Fleet Sales Policy also identifies consequences for a violation
12 therein: (1) placing limitations on future product allocations or shipments; (2) charging back to the
13 dealer any incentives or allowances credited or paid with respect to the violating sale; (3) placing the
14 dealer in Not in Good standing status; (4) charging back any internal and external audit and legal
15 expenses to the dealer; (5) making dealer ineligible to purchase fleet motorcycles for one or more
16 model years; or (6) terminating the dealer's contract. [Exhs. 7, 210.]

17 As to these less severe consequences, Respondent did not impose less severe consequences
18 to Protestant's violations prior to issuing a termination notice, such as limiting future product
19 allocations or shipments. [RT Vol. II, 158:12-24 (Kennedy).] However, Respondent has imposed
20 less severe sanctions on other dealerships who have violated the Non-Retail Sales Policy. [RT Vol.
21 IV, 48:9-17; 49:12-18 (Verduyn).] Moreover, there has been no monetary loss or damage sustained
22 as a result of Protestant's violations to the Non-Retail Sales Policy and the Fleet Sales Policy as
23 reflected by Respondent's lack of evidence regarding any such loss and absence of any estimate of
24 the possible existence or extent of any such loss. Respondent is not aware of any fines, sanctions, or
25 penalties imposed on Respondent by foreign governments for units sold by unauthorized sellers in
26 foreign countries. Respondent intimated, but did not prove, that motorcycles exported were
27 disassembled and even then there is no evidence or proof of any kind that there was any injury or
28 monetary loss. [RT Vol. I, 148:13-149:25 (Kennedy); Vol. V, 161:1-13 (McGowan).] In essence,

1 Respondent has given no indication that it has suffered any direct damages, monetary or otherwise,
2 as a result of Protestant's purported violations.

3 The gross profits generated by Protestant's violation units in 2009, 2010 and through
4 March 2011 are only a small fraction as compared to the total dealership gross profits for the same
5 periods. From 2009 through March 2011, the total dealership gross profit was \$8,931,081, whereas
6 the violation unit gross profit was \$123,846 for that period, which is only 1.38% of the total
7 dealership gross profit. [RT Vol. XI, 35:25-36:15 (Stockton); Exh. 634, Tabs 11 and 12.]

8 Despite these modest figures, Protestant has offered and continues to offer full
9 reimbursement to Respondent for any and all costs, expenses, or other losses caused by the retail
10 policy violations identified from the audit. To date, Respondent has not responded to Protestant's
11 offer of reimbursement. [RT Vol. II, 148:4-12 (Kennedy); Exh. 124.]

12 The safety recall campaigns that appear on the list of Protestant's audit report
13 (campaigns 0141, 0144 and 0145) were all reported to the National Highway Traffic Safety
14 Administration ("NHTSA"). Therefore, even if the ultimate customer did not receive notice of the
15 recall campaign through the customer registration information that Protestant submitted to
16 Respondent via the Safety and Warranty Registration ("SWR") form, information regarding the
17 recall campaigns is equally available to members of the public on the NHTSA website. Those recall
18 campaigns are also reported to foreign governments in every country where Harley-Davidson
19 markets its products. [RT Vol. V, 147:20-148:11 (McGowan).]

20 During the hearing, Respondent asserted that there are several "negative" consequences that
21 result from Plaintiff's exporting of new motorcycles, in violation of Respondent's Non-Retail Sales
22 Policy. However, Respondent's assertions are not exclusive to situations in which new motorcycles
23 are exported and, in fact, can occur in "innocent" or non-violation situation. For example,
24 Respondent claims that one "negative" consequence of exporting is that the owner of a
25 motorcycle that has been exported cannot be notified of Respondent's recall safety campaign. In the
26 United States, Respondent notifies customers of a safety recall campaign based on
27 the customer's address and Vehicle Identification Number ("VIN") found in the SWR database.
28 The SWR database is based on the information on the SWR form that each dealer obtains from the

1 customer at the time of sale. If the customer's contact information on the SWR form indicates an
2 address in the United States, but the new motorcycle has actually been exported to a foreign country,
3 a recall safety notice cannot be sent out to the foreign owner of the motorcycle because the new
4 owner's address is not provided on the original SWR form. [RT Vol. V, 88:14-89:16; 90:19-91:14
5 (McGowan).]

6 Respondent claims that another "negative" consequence of exporting is that the
7 specialized "fit" of each motorcycle to the purchasing customer will no longer apply. At the time of
8 purchase, each motorcycle is specially fit with the proper physical adjustments for each customer
9 including the seat, hand controls, handlebars and shift levers. If the motorcycle is exported, the
10 specialized design and fitting that is set for the original customer will be useless. [RT Vol. V, 97:2-
11 98:2. (McGowan).]

12 Respondent further claims that another "negative" consequence of exporting new
13 motorcycles is that these vehicles may be disassembled by gray market dealers to reduce the taxes
14 on overseas shipment. Respondent contends that if these motorcycles are reassembled by a non-
15 authorized Harley-Davidson dealer, it would pose a safety issue to the consumer because it may be
16 reassembled in a negligent manner. [RT Vol. V, 132:22-133:15 (McGowan).]

17 Finally, Respondent contends that the exporting of a new motorcycle muddles with
18 the specified number of motorcycles that have been specifically allocated by Respondent to be
19 shipped and sold in California. Thus, Respondent claims, the exporting of a new motorcycle
20 deprives California of a unit and is misleading to Respondent's demand-driven allocation system.
21 [RT Vol. I, 159:3-9; Vol. II, 29:17-19 (Kennedy).]

22 However, in each of these scenarios, since the Non-Retail Sales Policy does not prohibit
23 the export of *used* motorcycles [Exhs. 6, 16], there is a similar likelihood that the foregoing
24 "negative" consequences may also occur in a non-violation setting, such as if a used motorcycle is
25 exported. Thus, if a used motorcycle is exported, it is just as likely that (1) the foreign-based
26 customer will not receive notice of recall safety campaigns; (2) the motorcycle is not the proper "fit"
27 for the foreign-based customer; or (3) the vehicle will be disassembled for overseas shipment.
28 Additionally, the exporting of a new motorcycle, which violates Respondent's Non-Retail Sales

1 Policy, deprives a motorcycle unit allocated to California no more than a vehicle that is sold out of
2 the state of California but within the United States, which does *not* violate Respondent's Non-Retail
3 Sales Policy. [Exhs. 6, 16.]

4 Additionally, purchasing a new motorcycle in California but shipping it outside of California
5 does not violate Respondent's Non-Retail Sales Policy, even though it has the same effect of
6 reducing the total number of units of Harley-Davidson motorcycles in California as would exporting
7 a motorcycle outside the United States. [RT Vol. II, 172:11-23 (Kennedy).]

8 Following the audit and receipt of the termination notice, Protestant has developed and
9 currently implements a comprehensive program to ensure compliance with Respondent's Non-
10 Retail Sales Policy, with an independent third-party, FIS Compliance Coach ("Compliance Coach"),
11 auditing their performance under the program. Compliance Coach was retained by Protestant in
12 May 2011 to provide consulting review and training on statutory regulations. John Gisiger of
13 Compliance Coach and Richard Litchfield, Protestant's General Manager, develop the compliance
14 training programs for the employees in Protestant's sales department. Compliance Coach conducts
15 monthly PowerPoint training sessions and monthly audits of up to sixty (60) of Protestant's sales
16 files for the previous month to ensure that all forms in every sales jacket are completed thoroughly
17 and accurately in accordance with Respondent's policies and procedures. Compliance Coach
18 reviews with Protestant's sales staff the policies and procedures for preparing deal jackets and
19 documentation with respect to Respondent's Non-Retail Sales Policy to ensure proper completion of
20 the SWR and post-delivery inspection ("PDI") forms. PDI forms are used to verify that the vehicle
21 has gone through an inspection, that the owner of the vehicle understands how it operates and that it
22 is a safe vehicle to drive. Compliance Coach also performs on-site review of compliance policies
23 and provides written risk assessment reports containing findings and recommendations for ongoing
24 program enhancements. As part of the training process, Compliance Coach, in conjunction with Mr.
25 Litchfield, have identified numerous "red flags" for the sales staff to beware of when making a sale
26 to a customer. Such "red flags" include whether the customer has previously purchased numerous
27 motorcycles, whether the customer is recognized as a "known exporter," whether the customer has a
28 motorcycle license and the customer's method of payment. [RT Vol. IX, 18:24-20:18; 21:6-31:2

1 (Litchfield); RT Vol. IX, 143:23; 147:8-10; 148:22-153:7; 156:4-157:4 (Gisiger); RT Vol. X, 12:1-8
2 (Gisiger); Exhs. 9; 36; 608; 610; 612; 614-616.]

3 After each audit is conducted, Compliance Coach generates a report documenting the
4 findings of the audit and provides copies to Protestant and Respondent. The results of the audit are
5 debriefed with Protestant's sales staff, the dealer operator Brent Laidlaw and the General Manager
6 Mr. Litchfield. Audits were conducted during each month from June to October 2011. In terms of
7 Protestant's overall progress, each subsequent audit report depicts a steady improvement in the sales
8 staff's compliance with Respondent's policies and procedures. By the time the October 2011 audit
9 was completed, there was only one error as to the PDI form. Protestant has been very receptive to
10 the training and feedback on implementing the best practices provided by Compliance Coach. In
11 Compliance Coach's view, such a consulting and training program is necessary for a dealer to
12 comply with Respondent's Non-Retail Sales Policy. Additionally, training was provided for
13 Protestant's service technicians which focused on accurate and proper completion of the PDI forms.
14 [RT Vol. X 5:7-12:19; 14:6-16:3 (Gisiger); Exhs. 9; 603-608; 612.]

15 Independent of Respondent's contentions that termination would be reasonable or
16 justified, Respondent has not established good cause for termination as defined in the Vehicle Code.
17 Moreover, Respondent has failed to establish that independent of Vehicle Code requirements,
18 termination would be reasonable or justified. Protestant's expert, Edward Stockton, testified
19 regarding several factors that were not included in Respondent's expert's report, prepared by Dr.
20 Dominique Hanssens, to sufficiently prove that termination is justified. For example, Mr. Stockton
21 testified that Dr. Hanssens' report failed to consider the interests of the consuming public and the
22 potential impact on foreign entities, such as dealerships, in determining the reasonableness of
23 termination. Moreover, the fact that Respondent does not perform random audits of dealerships to
24 determine export violations runs contrary to Respondent's claim that export violations are of critical
25 importance and such violations warrant termination of Protestant's franchise. In other words,
26 Protestant's contention as to the alleged potential harm to Respondent's brand name as a result of
27 export violations would be far more credible if Respondent performed random audits to substantiate
28 their claim as to harmful impact of grey market exports. Mr. Stockton testified that nothing has

1 been established in the case that would indicate that Respondent has audited every dealership that
2 Respondent knows has committed export violations. Mr. Stockton also testified that there is
3 insufficient evidence to establish whether every dealership that had over 20 export violations
4 received a termination letter (the method of detecting violations not being sufficient to identify
5 every such occurrence of over 20 export violations). These factors are important considerations
6 when determining whether Respondent has acted reasonably in their decision to terminate
7 Protestant's franchise. [RT Vol. XI, 51:22-55:14 (Stockton).]

8 Furthermore, Mr. Stockton identified other factors that Mr. Hanssens neglected to include in
9 his report in concluding that termination was warranted. Such factors include the effects of the
10 termination or "externalities", such as the harm to Protestant's employees, the harm to Laidlaw's
11 investments and the harm to the consuming public if Protestant was terminated. Thus, Respondent
12 has failed to take all relevant factors into account in justifying their decision to terminate the
13 franchise. [RT Vol. XI, 51:22-55:14; 59:5-20 (Stockton).]

14 In addition, Respondent is motivated by independent reasons to proceed with termination in
15 this case in that it desires to reduce the number of dealers in the Los Angeles area significantly in
16 connection with its market consolidation initiative. [RT Vol. VIII, 42:13-45:20; Exh.23.] Allowing
17 termination in this case would result in an unwarranted windfall to Respondent that would allow it
18 to further its dealer-reduction goals without having to deal facilitate or await the so-called voluntary
19 process of dealer consolidation referred to in the materials presented to the dealers in Los Angeles.
20 [Exh. 23.]

21 **X. THE BOARD SHOULD SUSTAIN THE PROTEST**

22 Vehicle Code Section 3067(a) provides: "The decision of the board shall be in writing and
23 shall contain findings of fact and a determination of the issues presented. The decision shall
24 sustain, conditionally sustain, overrule, or conditionally overrule the protest. Conditions imposed
25 by the board shall be for the purpose of assuring performance of binding contractual agreements
26 between franchisees and franchisors or otherwise serving the purposes of this article." In
27 accordance with this clear language, Protestant proposes that the Board sustain the protest
28

1 unconditionally.

2 a. The Board should sustain the protest unconditionally.

3 As an initial matter, Protestant should not be terminated for the reasons previously identified.
4 In its notable, 54 year history, the amount of business transacted by the Protestant has been
5 substantial and the amount of business transacted by the Protestant relative to the business available
6 to the dealership is comparatively high. Protestant's number of registrations and sales as compared
7 to the national average in its dealer-assigned territory of Baldwin Park was 158% in 2010. In 2011,
8 that figure was 164.4%. These figures show that Protestant's sales relative to other dealerships in
9 the district is substantially higher. [RT Vol. XI, 28:5-30:22 (Stockton); Exh. 634, Tab 7].

10 The investments necessarily made and obligations incurred by the Protestant to perform its
11 part of the franchise have been significant and termination will result in a significant loss to
12 Protestant as to these investments. The current range of goodwill or franchise value of Laidlaw's
13 Harley-Davidson is \$4 million to \$8 million, an average of \$6 million. [RT Vol. X, 6:25-9:8; 13:6-
14 12 (Woodward); Exh. 135, p. 6.] Furthermore, the investment in Protestant's Harley-Davidson has
15 significant permanency and will be adversely affected by termination. Protestant has made
16 substantial investments in the facility and the business. Dealer operator Brent Laidlaw estimates
17 that the total investments made is approximately \$6.5 to \$7 million. [RT Vol. VIII, 10:17-24 (B.
18 Laidlaw).]

19 Protestant is actively involved in community-based charity activities, has extensive rental
20 and insurance services, and offers exclusive discounts and benefits to its customers. Protestant is
21 one of the few dealerships exclusively involved with multiple contract negotiations with police
22 departments in neighboring communities to sell them Harley-Davidson parts, as well as leasing
23 vehicles to other nearby municipalities. [RT Vol. IX, 85:10-86:1 (Litchfield).] For these reasons
24 among many others, termination of Protestant's franchise will be injurious to the public welfare.

25 Additionally, it is undisputed that the Protestant provides more than adequate motor vehicle
26 sales and service facilities, equipment, vehicle parts and qualified service personnel to reasonably
27 provide for the needs of its consumers and has been and is rendering adequate services to the public.
28 [RT Vol. II, 133:10-134:17 (Kennedy).] The Protestant has fulfilled the warranty obligations of the

1 Respondent and the extent of Protestant's failure to comply with the terms of the franchise
2 agreement is insufficiently material to warrant termination.

3 Furthermore, while the franchise agreement between the parties states that Respondent may
4 exercise its right to terminate the franchise if the Dealer fails to perform its sales, service or facility
5 responsibilities [Exh. 2], Vehicle Code Section 3060 mandates specific conditions that must be met
6 before a contract can be terminated. Section 3060(a) states, in relevant part:

7 (a) Notwithstanding . . . the terms of any franchise, no franchisor shall
8 terminate or refuse to continue any existing franchise unless all of the
9 following conditions are met:

10 (1) The franchisee and the board have received written notice from the
franchisor as follows:

11 (A) Sixty days before the effective date thereof setting forth the
specific grounds for termination or refusal to continue.

12 In other words, Vehicle Code Section 3060 remains unaltered by the terms of the franchise
13 agreement between the parties. This is particularly true in light of the showing that there was no
14 specific harm to Respondent and no showing of intent to deceive, but rather that there was a lack of
15 understanding of the Non-Retail Sales Policy on the part of Protestant. [RT Vol. VIII, 54:3-14 (B.
16 Laidlaw).] Respondent does not have an estimate of the monetary loss or damage sustained as a
17 result of Protestant's violations to the Non-Retail Sales Policy and the Fleet Sales Policy.
18 Respondent is not aware of any fines, sanctions, or penalties imposed on Respondent by foreign
19 governments for units sold by unauthorized sellers in foreign countries. Respondent is not aware of
20 any injury to persons or property as a result of the motorcycles not being properly assembled. [RT
21 Vol. I, 148:13-149:25 (Kennedy); Vol. V, 161:1-13 (McGowan).] Indeed, once Respondent's
22 developed an understanding of these policies, the Compliance Coach program was immediately put
23 into effect and Protestant has and continues to comply with all of Respondent's policies and
24 procedures and to go above and beyond what has been requested. [RT Vol. IX, 18:24-20:18; 21:6-
25 31:2 (Litchfield); RT Vol. IX, 143:23; 147:8-10; 148:22-153:7; 156:4-157:4 (Gisiger); RT Vol. X,
26 12:1-8 (Gisiger); Exhs. 9; 36; 608; 610; 612; 614-616.]

27 Under Respondent's own Non-Retail Sales Policy under which Respondent is seeking to
28 terminate the franchise, there is a series of progressively severe consequences for violation of the

1 policy. Respondent's Non-Retail Sales Policy identifies the following consequences for violation
2 therein: (1) placing limitations on future product allocations or shipments; (2) charging back to the
3 dealer any incentives or allowances credited or paid with respect to the violating sale; (3) placing the
4 dealer in Not in Good standing status; (4) charging back any internal and external audit and legal
5 expenses to the dealer..." [RT Vol. II, 156:4-157:1 (Kennedy); Exhs. 6, 208, 209.] These viable,
6 alternate consequences run contrary Respondent's assertion that it must terminate the franchise in
7 order to effectively enforce the policy.

8 Based on the foregoing, Protestant respectfully requests the Board to sustain the protest
9 unconditionally.

10 b. If the Board is not inclined to sustain the protest unconditionally, it should sustain
11 the protest conditionally.

12 If the Board is not inclined to sustain the protest unconditionally, Protestant respectfully
13 requests the Board to sustain the protest conditionally, pursuant to Vehicle Code Section 3067(a).
14 The language of Section 3067(a) clearly states that the purpose of any conditions imposed by the
15 board is to fulfill any contractual obligations between the parties: "Conditions imposed by the board
16 shall be for the purpose of assuring performance of binding contractual agreements between
17 franchisees and franchisors or otherwise serving the purposes of this article." See *American Isuzu*
18 *Motors, Inc. v. New Motor Vehicle Bd.* (1986) 186 Cal.App.3d 464, 477 ("The board does indeed
19 have the power to issue a conditional order 'for the purpose of assuring performance of binding
20 contractual agreements between franchisees and franchisors or otherwise serving the purposes of
21 this article.'").

22 In accordance with this statutory purpose of compliance with the franchise terms, if the
23 Board is not inclined to sustain the protest unconditionally, Protestant respectfully requests that the
24 Board sustain this protest conditionally, and that as a condition, the Board order that Protestant's
25 compliance program continue in full effect for a specified duration (e.g., three years). As a further
26 condition of sustaining the protest, Protestant proposes that all of the Compliance Coach's audit
27 reports be made available to Respondent during this specified period so that Respondent may take
28 appropriate action should it identify any specific violation of its policies in the future. In turn,

1 Protestant will comply with all available sanctions under the terms of the Non-Retail Sales Policy
2 that Respondent wishes to impose, or gives notice that it is exercising, short of termination. Such a
3 proposal would be consistent with the board's statutory authority set forth in Vehicle Code Section
4 3067(a), which allows the Board to set such conditions for purposes of furthering compliance with
5 the franchise agreement.

6 Protestant also proposes, as another condition of sustaining the protest, that the Board
7 require Protestant to provide full reimbursement of expenses to Respondent in accordance with the
8 Non-Retail Sales Policy ("charging back any internal and external audit and legal expenses to the
9 dealer..."). [Exhs. 208, 209.] Indeed, Protestant has already offered such reimbursement. In a letter
10 from Brent Laidlaw to Mr. Kennedy, Protestant offered and continues to offer full reimbursement to
11 Respondent for any and all costs, expenses, or other losses caused by the export violations identified
12 from the audit. To date, Respondent has not responded to Protestant's letter or offer of
13 reimbursement. [RT Vol. II, 148:4-12 (Kennedy); Exh. 124.]

14 c. If the Board is not inclined to sustain the protest, then it should be overruled only
15 conditionally.

16 While it is clearly the appropriate course to unconditionally sustain the protest and, if not, to
17 conditionally sustain the protest as set forth above, if the Board elects not to proceed in that regard,
18 then at an absolute minimum, the only way the protest should ever be contemplated as overruled is
19 if the overruling was conditional. This option is also afforded by Vehicle Code Section 3067(a),
20 which states that the board may issue a decision to "conditionally overrule" the protest. If the Board
21 is inclined to overrule the protest, Protestant proposes that as a condition, Protestant should be
22 provided time to sell the dealership business to a qualified third party buyer. This option supports
23 an approach that would alleviate the injury or loss to the public even temporarily before a
24 replacement dealer can be retained, which is consistent with the considerations of Vehicle Code
25 Section 3061(d) ("Whether it is injurious or beneficial to the public welfare for the franchise to be
26 modified or replaced or the business of the franchisee disrupted.").

27 Indeed, this approach was previously proposed by Respondent in an e-mail from Mr.
28 Kennedy, Respondent's Vice President of North American Sales, to Brent Laidlaw which was dated

1 October 14, 2011, immediately prior to the hearing in this matter. In that e-mail, Mr. Kennedy
2 stated, in part:

3
4 I said during [my deposition] that the Motor Company plans to replace
5 your dealership after the termination becomes effective. In the meantime, you
6 should understand that we have no objection to you attempting to sell your
7 dealership's assets to a qualified buyer before the effective date of termination.
8 If this is something that interests you, we could refer to you people whom we
9 believe might be interested, and would likely be qualified. We would, as is
10 standard, want to receive something in writing from you requesting such
11 referrals, since we do not ordinarily do that without our dealer's authorization.

12 I also note that we see no reason your family could not continue to lease
13 your facility to such a new dealer, as you do now, if the parties to such a
14 transaction wanted to do so. There are no other "strings" attached to our
15 willingness to help in this regard.

16 [Exh.223 (emphasis added.); RT Vol. II, 102:6-103:7 (Kennedy).] Accordingly, since there is no
17 opposition to this approach, if the Board is not inclined to sustain Protestant's protest conditionally
18 or unconditionally, Protestant respectfully requests the Board to overrule the protest conditionally.

19 **XI. CONCLUSION**

20 Based on the foregoing, Protestant respectfully requests that the Board find that Respondent
21 has failed to establish that good cause exists to terminate Protestant's franchise and that Protestant's
22 protest be sustained unconditionally.

23 DATE: March 9, 2012

MANNING, LEAVER, BRUDER & BERBERICH

24 BY Crystal Yagoobian
25 Halbert B. Rasmussen
26 Crystal S. Yagoobian
27 Attorneys for Protestant Laidlaw's Harley-
28 Davidson Sales, Inc. dba Laidlaw's Harley-
Davidson

1 **Proof of Service**

2 I, the undersigned, declare and say as follows:

3 I am 18 years of age or older, employed at the business noted above my signature which is in the county where any mailing herein stated occurred, and not a party to the within action.

4 On March 9, 2012, I caused to be served the document(s) listed below my signature under the heading "Document(s) Served" by placing a copy of the document(s) (or the original, if so noted below) in individual envelopes for each of the parties listed below my signature under the heading "Parties Served" (except for fax-only service), addressed to them at their last known addresses in this action exactly as shown (excepting parenthetical references to their capacity), there being U.S. Mail delivery service to those addresses used for service by mail, and by sealing said envelopes, and on the same day, as marked with "X," by --

7 placing each envelope for collection and processing for mailing following my firm's ordinary business practice with which I am readily familiar and under which on the same day correspondence is so placed for mailing it is deposited in the ordinary course of business with the U.S. Postal Service at my business address, 1st-class postage fully prepaid.

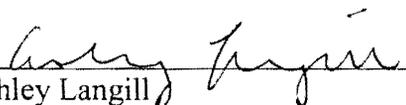
electronically sending by email or by fax each page of each document and this proof of service to the parties served at their last known email address or fax numbers as listed below from a email or fax system located at my business address which reported no errors and which, if by fax, produced a transmission confirmation report, a true copy of which is attached hereto. [use only if electronic service authorized or as a supplement.]

11 depositing each envelope into the U.S. mail with 1st-class postage fully prepaid at a mail box or collection facility in the city and state of my business address. "Parties Served" lists all parties and counsel served in the within matter, and their respective capacities. [required for federal cases, including bankruptcy, among others]

depositing each envelope at a drop box or other facility in the city and state of my business address within the time and pursuant to procedures readily familiar to me necessary for delivery by Federal Express on the morning of the next business day or by courier on the same day. [use only if overnight or courier service authorized or as a supplement.]

15 personal delivery by travelling to the address shown on the envelope and delivering it there during normal business hours or handing the documents to the person served.

16 I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed on March 9, 2012 at my business address, 5750 Wilshire Blvd., Suite 655, Los Angeles, California 90036, in the County of Los Angeles.

18 
Ashley Langill

20 **Document(s) Served (exact title)**

21 **PROTESTANT LAIDLAW'S HARLEY-DAVIDSON SALES, INC. DBA LAIDLAW'S HARLEY-DAVIDSON'S POST-HEARING BRIEF**

22 **Parties Served (exact envelope address)**

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